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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 587

CONSOLIDATED TEXTILE CORPORATION,
Appellant,

vs.

JOHN J. GREGORY, Judge of the Circuit Court of Milwaukee County.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

APPELLANT'S BRIEF IN REPLY.

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Supreme Court of the United States

CONSOLIDATED TEXTILE CORPORATION, Appellant, *against* JOHN J. GREGORY, Judge of the Circuit Court of Milwaukee County, Respondent.	No. 587. OCTOBER TERM, 1932.

APPELLANT'S BRIEF IN REPLY.

As we have suspected would be the case, respondent's brief seeks to perpetuate in this Court the confusion regarding the facts which was created by his counsel in the minds of the court below. The greater part of the argument is based upon alleged facts which counsel must know to be unfounded; and, in view of the manner of their introduction to the record, the conclusion is almost irresistible that they were inserted by design in an effort to bring the controversy directly within the ruling of the Supreme Court of Wisconsin in Fond du Lac C. & B. Co. *v.* Henningsen, 141 Wisc. 70. Unfortunately, the effort was successful in the court below, for which reason, at the risk of some repetition, we have concluded to seek to guard against a similar result here.

At page 2 of their brief, respondent's counsel observe that "the facts . . . are *practically undisputed*";* and it is

* Unless otherwise stated, all italics in this brief are ours.

related that "as stated in Mr. Rupprecht's affidavit (R. 13, 14) * * * *Katherine Gold and six* other Wisconsin bondholders of appellant corporation transferred their interest coupons amounting to $368 which matured December 1, 1930 on appellant's bonds, to one Edythe H. Stegman of New York, who commenced an action in New York on such coupons. *These seven Wisconsin bondholders retained the bonds and subsequent interest coupons.* When a motion for summary judgment was granted in favor of Stegman in the New York action, Mr. Rupprecht *was sent by his corporation* to Wisconsin to see Mr. Gold, the attorney for *the seven* Wisconsin bondholders, *for the purpose of somehow disposing of the claims of the Wisconsin bondholders against the corporation*—Mr. Rupprecht claiming in his affidavit (R. 15) *he was sent* to persuade the Wisconsin bondholders to withhold entry of the judgment in the New York action and to deposit their bonds *with the corporation's committee.*"

Although none of the quoted statements, except those to the effect that the New York action was based upon interest coupons aggregating $368 and that Mr. Rupprecht sought to persuade Mr. Gold to influence the owners of the bonds represented by him to deposit them with a bondholders' committee, has the slightest support in the Record, the recital of facts preceding the opinion of the Supreme Court of Wisconsin and the opinion itself (R. 38, *et seq.*) disclose that the court below accepted such non-existent facts as controlling its conclusion.

It is, therefore, interesting to note that, except in Respondent's return (R. 34, sub. 8), this Court will find nothing in the Record indicating any information or knowledge on Mr. Rupprecht's part regarding the ownership of the

bonds and coupons which are the subject matter of the seven Wisconsin suits until after the service of the summonses and complaints therein (R. 15, 16, 19, 20); or indicating that the Stegman suit in New York is based upon coupons transferred by the *seven* plaintiffs in those suits; that Mr. Rupprecht "*was sent*" to Wisconsin by anyone, or that his visit was "for the purpose of somehow disposing of the claims of the Wisconsin bondholders"; nor does his affidavit make any reference to the deposit of bonds "with the *corporation's* committee." Mr. Rupprecht's affidavit identifies the *five* parties interested in the New York suit (R. 13, sub. 6); shows that as president of the appellant corporation, he visited Wisconsin of his own volition (R. 13 and 14, sub. 1, 2, 3, 4, 5, 6); and makes no reference to the bondholders' committee in any manner justifying its being characterized as "the *corporation's* committee."

Respondent's counsel seek to give effect as "findings" to the statements in the return to the alternative writ (Brief 4), among which is that "upon full and fair consideration of the affidavits of both the plaintiff and the defendant . . . I found that . . . Frederick K. Rupprecht was sent by said defendant corporation to Wisconsin to attempt to settle the *seven* individual claims of Wisconsin bondholders"; and the non-existent fact that such was the purpose of the visit is made the pivotal point of Respondent's argument that the Wisconsin service was justified, notwithstanding that Mr. Rupprecht's affidavit states clearly and definitely that his visit had another purpose (R. 13 and 14, sub. 4, 5, 6); and that neither his nor the affidavit of Mr. Gold indicates that it was concerned in any manner with the seven suits or that he was aware of the

claims involved therein until after the summonses had been served.

Is it an unreasonable assumption that Judge Gregory's return was prepared by the attorneys for Katharine Gold? At all events, it was adopted by her "and will be relied upon as a sufficient cause why said alternative writ of prohibition should not be made absolute herein" (R. 36). Accordingly, we have a situation where non-existent facts are relied upon both by the Supreme Court of Wisconsin and by Respondent as determining the merits of the controversy.

Point II of Respondent's brief is that a single transaction in Wisconsin is sufficient to bring the foreign corporation there for jurisdictional purposes, and the decision of the Wisconsin Supreme Court in Fond du Lac C. & B. Co. *v.* Henningsen, *supra*, where the controlling fact was that defendant's officer had come to Wisconsin for the purpose of seeking to adjust the controversy which was the subject matter of this suit, is stated to be decisive; and the argument of the point concludes with the assertion (Brief, 18) that "this court must accept the construction of the Wisconsin process service statute as though the statute specifically authorized service on Mr. Rupprecht when he came to Wisconsin *in relation to the matter sued on . . .*".

Point III of the brief is that appellant became amenable "By sending its President to Wisconsin to settle a number of claims against it or *to accomplish a result in connection with the matter sued on.*"

Point IV is that the Due Process clause is not violated by service "on an authorized officer of a corporation *who comes into the State to settle or deal with the matter sued on.*"

As only points II, III and IV deal with the proposition that, as decided in the Fond du Lac case, the Wisconsin courts have jurisdiction over a foreign corporation when an agent thereof visits Wisconsin in an effort to adjust the controversy which is the subject matter of the suit, Respondent's entire argument upon that subject rests upon asserted facts which counsel must be aware are wholly without support in the record.

Although we wish to be certain that the significance of the circumstance does not escape the Court's attention, we have no desire to further comment thereon.

As bearing upon the intent of Respondent's counsel, we might also point out that the brief (p. 2) also relates as "practically undisputed" facts that Katherine Gold "commenced an action" against Appellant in the Circuit Court of Milwaukee County to recover "*$2500* and interest *due* her from appellant on negotiable bonds *sold to her by appellant* (R. 9-12)." A copy of the complaint in that action appears on pages 9-12 of the record. If we are to take its statements to be correct, we find therefrom that plaintiff's $2,500 face amount of bonds are payable *twenty years* after June 1, 1921 (R. 10) and that she "is the owner and holder of said bonds *in due course* for value" (R. 11). Thus, according to the plaintiff's own statement of her case, the bonds which she owns are not by their terms due and she did not acquire them from the Appellant here.

Notwithstanding that the complaint, which is unverified, was the only part of the record before the Circuit Judge dealing with the ownership of any of the bonds involved in the seven actions, he stated in his verified return to the writ (R. 34, sub. 8) that the claims of said seven bondholders * * * were based on bonds issued by "Appel-

lant * * * and sold to said bondholders for value," and that Appellant "had defaulted in the payment of interest and *principal.*" Although *the statement purports to have been founded upon* Mr. Rupprecht's affidavit, that instrument will be searched in vain for any averment bearing the slightest resemblance thereto.

The most noteworthy circumstance regarding the legal discussion under the three points mentioned is that it completely ignores the question involved as frequently stated by this Court and presented in the two points of our main brief. Respondent's argument is to the effect that, within the doctrine of the Fond du Lac case, a single transaction by a foreign corporation may constitute the transaction of business in Wisconsin sufficiently to give its courts jurisdiction to pronounce a personal judgment if it concerns the subject matter of the action instituted there; and that the Supreme Court of Wisconsin has held that jurisdiction so acquired and exercised is due process of law. Because it is beside the fundamentals of the case, the correctness of the argument may be conceded without affecting the merits of our contention.

Respondent's brief (p. 12) contends that the facts asserted in Judge Gregory's return cannot be challenged here because their incorrectness is not assigned as error; also that appellant's Third and Fourth assignments of error "admit Mr. Rupprecht came to Wisconsin to 'compromise' the New York action."

The first contention is sufficiently met by bearing in mind that errors of the Supreme Court of Wisconsin, not those of Judge Gregory, are presented for consideration on this appeal; and the second may be admitted for the purposes of our argument. A mission to compromise a suit

upon five coupons payable December 1, 1930, aggregating $328 and appertaining to $9,200 principal amount of bonds is hardly the same as one to settle unasserted claims of seven holders upon bonds aggregating more than $15,000 in principal amount and the coupons attached thereto payable July 1, 1931 (R. 13, sub. 6; 34 subs. 8 and 10).

We might add, however, that assignments of error are quite the antithesis of statements of fact; and, so far as the author of this brief can ascertain, no fact in the record indicates that the purpose of Mr. Rupprecht's visit was to compromise the New York suit; nor did the Supreme Court of Wisconsin so find (R. 38 *et seq.*). Such being the case, we are unable to perceive the pertinency of an assignment of error indicating the contrary.

If we have convinced this Court that the sole purpose of Mr. Rupprecht's visit was to prevent entry of judgment in the New York suit, it is somewhat reassuring to find in Judge Gregory's return (R. 34, sub. 10) the statement that the action "was not brought on behalf of Katherine Gold, plaintiff in this action, or the other bondholders aforementioned, but was solely in the name of said Edythe H. Stegman to recover $368 on bearer interest coupons for interest due on bonds issued by Consolidated Textile Corporation . . . and that said action of Edythe H. Stegman *had nothing to do with this action, or the actions of the other six bondholders aforementioned.*" It would seem, therefore, that, to the extent that Respondent's position relies upon the asserted circumstance that Mr. Rupprecht was in Wisconsin to settle or compromise the New York suit, it must forfeit the protection of the Fond du Lac case, which sustained the jurisdiction of the Wisconsin court only because

the agent of the foreign corporation was present there at the time of service in an effort to compromise the claim upon which suit was brought.

Respondent pursues his effort to persuade this Court to base its conclusions upon non-existent facts by arguing (Brief, Point I) that by demurring to the return appellant has admitted the facts therein stated.

Section 293.09 (p. 2130, Official Printed Edition of the Statutes of the State of Wisconsin) provides that, in a prohibition proceeding respondent must make return to the writ "in the same manner as a writ of mandamus"; and Section 293.10 provides that the relator in a mandamus proceeding may take issue upon or demur to the matters relied upon in the return.

The practice in Wisconsin is to treat the relation and the alternative writ as a complaint and the return as an answer.

> *State ex rel. Town of Spring Lake* v. *Pierce County*, 71 Wisc. 321, 325; 37 N. W. 231;
> *State ex rel. Cothren* v. *Lean*, 9 Wisc. 279, 289-90.

In the case last cited the Court said (p. 290):

> "But we do not think this view correct. On the contrary, we are satisfied, both from the reason of the thing and from the authorities on the subject, that the affidavit, or petition on which the alternative writ issues, the allegations of which are incorporated into the writ itself, performs the office of a declaration. It sets forth the grounds relied on by the prosecutor, as entitling him to the peremptory writ, and it is incumbent on the respondent, by his return, to sufficiently answer those allegations, and negative

> the prosecutor's right. The function of the return is not simply to show what would amount to a *prima facie* right in the respondent, in the absence of any allegation to the contrary; but it is to show a right to refuse obedience to the writ, in view of the allegations it contains. And if it does not do this it is demurrable. And the very object of a demurrer to the return, *is to test its sufficiency as an answer to the allegations of the writ;* and it is obvious that this can only be done *by assuming all the material allegations of the writ not denied, nor confessed and avoided, to be true.*"

Applying this rule, we find that Judge Gregory's return states that Exhibit "C" of the return is a correct copy of Mr. Rupprecht's affidavit upon the motion to vacate the service (R. 33, sub. 2) and that the facts alleged in the return, upon which respondent mainly relies (R. 34, sub. 8), are stated to have been derived from that affidavit. Thus, not only are the allegations of the relation, and the alternative writ based thereon, not denied by the return, but they are stated to be the basis of the return itself so far as it touches upon those facts.

It is the rule in Wisconsin as elsewhere that a demurrer admits only facts well pleaded.

> *Stedman* v. *City of Berlin*, 97 Wisc. 505, 514; 73 N. W. 57;
>
> *State ex rel. Koch* v. *Melms*, 160 Wisc. 274, 278; 151 N. W. 783.

Accordingly, erroneous conclusions from facts are not admitted.

> *Northwestern M. L. Ins. Co.* v. *State*, 173 Wisc. 119, 125; 180 N. W. 138.

The situation here is analogous to that which would be presented by a demurrer to an answer in a suit wherein it was alleged that an exhibit attached to and made a part of the complaint contained statements which reference to the complaint disclosed were not contained therein. Will it be contended that, under such conditions, the statements in the answer must be accepted as true?

That, despite a demurrer, this Court will not close its eyes to the actual facts in a record is stated clearly in *Truax* v. *Corrigan*, 257 U. S. 312, 324-25, cited at pages 14 and 15 of our main brief.

Points V and VI of respondent's brief are, we trust, sufficiently covered in the brief previously filed by appellant herein.

Respectfully submitted,

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